

FEDERAL CIRCUIT COURT OF AUSTRALIA

MAHMOUD v MINISTER FOR IMMIGRATION & ANOR [2018] FCCA 54

Catchwords:

MIGRATION – Review of Administrative Appeals Tribunal decision – refusal of a partner visa – whether the Tribunal erred by focusing on the motivation for the relationship or whether the Tribunal breached s.359A of the Migration Act considered – jurisdictional error established.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359AA, 359A

Migration Regulations 1994 (Cth)

Cases cited:

Minister for Immigration v Angkawijaya [2016] FCAFC 5; (2016) 236 FCR 303

Minister for Immigration v Wu Shan Liang (1996) 185 CLR 259

Minister for Local Government & Ethnic Affairs v Gamdur Singh Dhillon & Anor [1990] FCA 144

Re Bineshri Prasad v Minister for Immigration [1985] FCA 47

SZBYR v Minister for Immigration (2007) 96 ALD 1

SZGIY v Minister for Immigration [2008] FCAFC 68

SZNCW v Minister for Immigration [2009] FCA 818

SZSOG v Minister for Immigration [2014] FCA 1053

Truong v Minister for Immigration [2014] FCA 1312

Applicant: AHMED EZZAT SHAABAN MAHMOUD

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 1800 of 2016

Judgment of: Judge Driver

Hearing date: 8 December 2017

Delivered at: Sydney

Delivered on:

8 February 2018

REPRESENTATION

Solicitors for the Applicant:

Mr M Jones of Parish Patience
Immigration Lawyers

Solicitors for the Respondents:

Ms S Given of HWL Ebsworth

ORDERS

- (1) A writ of certiorari shall issue removing the record of the Administrative Appeals Tribunal decision made on 27 June 2016 into this Court for the purpose of quashing it.
- (2) A writ of mandamus shall issue requiring the Administrative Appeals Tribunal to redetermine the review application before it according to law.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1800 of 2016

AHMED EZZAT SHAABAN MAHMOUD

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The applicant (Mr Mahmoud) seeks judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 27 June 2016. The Tribunal affirmed a decision of a delegate of the Minister (delegate) to refuse to grant Mr Mahmoud a temporary partner visa.
2. The following statement of background facts is derived from the submissions of the parties.
3. Mr Mahmoud is a citizen of Egypt who first arrived in Australia as the holder of a student visa in 2005. With the assistance of a migration agent, he applied for a partner (Temporary) (Class UK) visa on 10

February 2014 on the basis of his relationship with his sponsor, Ms Amale Shockair,¹ attaching a statement² and other supporting documents.³ Further documents and particulars were given later to the delegate.⁴

4. On 22 June 2015, the delegate refused to grant the visa on the basis that Mr Mahmoud did not satisfy clauses 820.211 and 820.221 of the *Migration Regulations 1994* (Cth) (Regulations) because the delegate was not satisfied that Mr Mahmoud was the spouse of the sponsor.⁵
5. On 23 June 2015 Mr Mahmoud applied to the Tribunal for review of the delegate's decision and appointed his migration agent as his representative,⁶ attaching the delegate's decision to the application.
6. On 11 May 2016 Mr Mahmoud's representative sent documents to the Tribunal under a cover letter.⁷
7. On 12 May 2016 the Tribunal sent an invitation to Mr Mahmoud (via his representative) to attend a hearing of the Tribunal,⁸ which he accepted.⁹ On 27 June 2016, Mr Mahmoud appeared before the Tribunal to give evidence and present arguments. Mr Mahmoud was assisted by his migration agent and the sponsor also attended and gave evidence.¹⁰
8. At the hearing Mr Mahmoud provided the Tribunal with additional documents, namely a telephone bill,¹¹ statutory declarations of Joumana Salameh¹² and Jasmine Salameh,¹³ bank statements¹⁴ and an extract from the sponsor's passport.¹⁵

¹ Court Book (CB) 1 to 30 and 56 to 58

² CB 31

³ CB 33 to 55

⁴ CB 65 to 118

⁵ CB 119 to 146

⁶ CB 147 to 149

⁷ CB 181 to 232

⁸ CB 233 to 235

⁹ CB 237 to 238

¹⁰ CB 240 and CB 270 at [3]

¹¹ CB 241 to 246

¹² CB 249 to 251

¹³ CB 254 to 256

¹⁴ CB 257 to 264

¹⁵ CB 265 to 266

9. On 28 June 2016 the Tribunal notified Mr Mahmoud (via his representative) of its decision made on 27 June 2016, affirming the decision of the delegate not to grant the visa.¹⁶

Tribunal decision

10. The Tribunal was satisfied that the parties were validly married.¹⁷ However, it was not satisfied that:
- a) Mr Mahmoud and the sponsor had a mutual commitment to a shared life to the exclusion of others;
 - b) their relationship was genuine and continuing; or that
 - c) Mr Mahmoud was the “spouse” of the sponsor as defined in s.5F of the *Migration Act 1958* (Cth) (Migration Act).¹⁸
11. In making those findings the Tribunal expressed concerns about the timing and the inception of the relationship, as well as the circumstances surrounding the breakdown of Mr Mahmoud’s previous relationship. The Tribunal also noted that Mr Mahmoud’s evidence implied that he was primarily motivated to enter into a relationship with the sponsor by his strong desire to remain in Australia.¹⁹

The present proceedings

12. These proceedings began with a show cause application filed on 13 July 2016. Mr Mahmoud continues to rely upon that application. There are two grounds in it:

1. *The Tribunal misinterpreted the definition of the term “spouse” in s5F of the Migration Act 1958.*

Particulars

- (a) *The Tribunal applied a test of motivation to the requirement in s5F(2)(b) which was not relevant to the determination of whether the Applicant had a commitment to a shared life as husband and wife to the exclusion of others.*

¹⁶CB 269 to 274

¹⁷CB 270 at [7]

¹⁸CB 274 at [25]

¹⁹CB 271 at [9] to [11]

(b) *To the extent that motivation may have had any relevance to the Tribunal's assessment of the relationship, it failed to:*

(i) *make finding, as opposed to expressing a concern, as to the Applicant's motivation; or*

(ii) *make a critical distinction between a “primary” and a “sole” motivation.*

2. *The Tribunal failed to comply with the statutory requirements of the “exhaustive statement of the natural justice hearing rule” in Division 5 of Part 5 of the Act.*

Particulars

The Tribunal took evidence at the hearing from a witness which included information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review. The Tribunal failed to deal with that information in accordance with s359A or 359AA of the Act.

13. In addition to the court book filed on 29 September 2016, I have before me as evidence the affidavit of Winnie David made on 20 October 2016, to which is annexed a transcript of the hearing conducted by the Tribunal on 27 June 2016.

14. Both Mr Mahmoud and the Minister filed pre-hearing written submissions and also made oral submissions through their representatives at the trial of this matter on 8 December 2017.

Did the Tribunal misinterpret the term “spouse” in s.5F of the Migration Act?

Applicant’s contentions

Motivation

15. The Tribunal's reasons for affirming the decision not to grant Mr Mahmoud’s visa are contained at [24] to [25] of the decision record:²⁰

The Tribunal acknowledges that the inconsistencies in evidence are minor and of little significance. The Tribunal acknowledges that there is a great amount of documentary evidence concerning the various aspects of the relationship and that the parties’ oral

²⁰CB 273 to 274

evidence to the Tribunal was broadly consistent. The Tribunal acknowledges that many aspects of the relationship point to the existence of a genuine and committed relationship. Against these considerations, the Tribunal has serious concerns about the circumstances of the break-up of the applicant's previous relationship and the reasons for it. The Tribunal is concerned about the applicant's motivations in entering this relationship because the Tribunal is concerned that his desire to remain in Australia was the primary, or the sole, consideration.

Overall, the applicant has not satisfied the Tribunal that his relationship with the sponsor is genuine. The Tribunal is not satisfied that the applicant and the sponsor have a mutual commitment to shared life to the exclusion of others. The Tribunal is not satisfied their relationship is genuine and continuing. The Tribunal is not satisfied the applicant is the spouse of the sponsor. He does not meet cl. 820.211 and cl. 820.221.

16. The Tribunal's "concerns" about the break up of the previous relationship are set out at CB 271-272. While the Tribunal finds it "implausible" that a couple could break up over a question of where they wanted to spend the rest of their lives, for that implausibility to have any relevance to the question of whether the subsequent relationship with the sponsor was genuine, the Tribunal would have to have made a finding that the first break up was contrived. It made no such finding. Its "concerns", therefore, are said to have been irrelevant to the question it had to decide.
17. The Tribunal's "concerns" about Mr Mahmoud's motivations in entering into the relationship refer to [9] of its reasons.²¹ It notes the following:
 - a) the parties claim that they first met in July 2013 and Mr Mahmoud proposed in early October 2013. (The Tribunal does not refer to any evidence that would challenge this "claim");
 - b) a religious marriage took place in October 2013 and a civil marriage in January 2014;
 - c) Mr Mahmoud's student visa was due to expire "only" four months after the formal marriage (though seven months after the

²¹CB 271

religious marriage) and “a short time after” the application for the partner visa; and

- d) Mr Mahmoud had not undertaken any formal study since 2011, which may have prevented him from renewing his student visa.

18. Whether or not others would agree that this chronology amounts to a “very quick inception” of the relationship, the highest at which the Tribunal puts it against Mr Mahmoud is that it is “concerned that the present relationship was arranged to enable the applicant to remain in Australia”. Mr Mahmoud submits that this is not a lawful basis on which the Tribunal could form the view that the couple did not have a genuine spousal relationship as required by the visa criteria.

19. Section 5F of the Migration Act²² defines the term “spouse”:

- (1) *For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.*
- (2) *For the purposes of subsection (1), persons are in a **married relationship** if:*
 - (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - (b) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (c) *the relationship between them is genuine and continuing; and*
 - (d) *they:*
 - (i) *live together; or*
 - (ii) *do not live separately and apart on a permanent basis.*
- (3) *The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the*

²² as at the time of the decision. It has subsequently been amended to reflect the legalisation of same-sex marriage

determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.

20. The Tribunal accepted that the couple were legally married under Australian law. In assessing the remainder of the statutory criteria, however, the Tribunal has weighed its “concerns” about Mr Mahmoud’s motivation against what it concedes is the great amount of documentary evidence and the broadly consistent oral evidence, all pointing to the existence of a genuine and committed relationship.

21. In *Re Bineshri Prasad v Minister for Immigration*,²³ Wilcox J stated at [36]:

There may be cases in which parties hold each other in real affection but in which some other factor provides the catalyst for the decision to marry. In such a case the marriage may be genuine enough, applying the test of intending to live together as a married couple, notwithstanding that, absent the other factor, the parties would not have married in the first place.

22. In *Minister for Local Government & Ethnic Affairs v Gamdur Singh Dhillon & Anor*²⁴, the Full Federal Court made these comments at [11]:

It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.

23. Although this passage from *Dhillon* has been quoted with approval in a number of later cases, in at least one case, *Truong v Minister for Immigration*²⁵, Greenwood J at [70] held it to be “of no assistance” since it pre-dated the statutory definition.

²³[1985] FCA 47

²⁴[1990] FCA 144

²⁵[2014] FCA 1312

24. Nevertheless, in the more recent case of *Minister for Immigration v Angkawijaya*²⁶ the Full Federal Court has assumed a continuing relevance of the test in *Dhillon*:

[...] the determination of whether or not a decision-maker is satisfied that there is a genuine de facto relationship is one which must be made as at the time of the decision and not by reference to some earlier point in time, such as when the parties embarked upon their relationship. In our view, as long as the relevant time is firmly kept in mind, we see no reason why the decision-maker should not take into account, together with all other relevant circumstances of the relationship, the motivation of one or both of the parties for entering into the relationship. However, as was emphasised by the Full Court in Dhillon at [11] per Northrop, Wilcox and French JJ, those motivations may change and the critical issue is whether or not the administrative decision maker is satisfied that the parties are in a genuine de facto relationship as at the time of the decision. We do not consider that the Tribunal erred in the approach it took to the relevance of what it considered to be Ms Angkawijaya's motivation to remain in Australia. The Tribunal correctly observed in [110] that Ms Angkawijaya's motivation was not "mutually exclusive" to there being a genuine de facto relationship. That statement is not inconsistent with Dhillon.

25. Even if the Tribunal's "concerns" about Mr Mahmoud's motivation may be interpreted as findings that he was motivated to some degree to enter into the relationship by a desire to remain in Australia, the correct test was the extent of his commitment, at the time of application for the visa and the time of decision, to a shared life with his sponsor to the exclusion of others.
26. Mr Mahmoud submits that the Tribunal failed to choose in its reasons between whether it thought that the desire to remain in Australia was "the primary, or the sole" consideration in Mr Mahmoud's mind. At the highest, it could be said that a definitive finding that Mr Mahmoud had no other consideration in mind would have meant that there was no room in his mind for a real commitment to the relationship of husband and wife, but the Tribunal did not make this finding. It allowed (but did not actually find) that the desire may have been the primary consideration, which would not have excluded the required commitment.

²⁶[2016] FCAFC 5; (2016) 236 FCR 303 at [64]

27. Mr Mahmoud contends that the Tribunal failed to consider the application against the statutory criteria, and so constructively failed to exercise its jurisdiction to review the delegate's decision.

Minister's contentions

28. Contrary to what is pleaded by Ground 1, the Minister submits that the Tribunal both understood and carried out its statutory task. A plain reading of the Tribunal's decision is said to demonstrate that the Tribunal had regard throughout to whether Mr Mahmoud was the spouse of the sponsor as defined by s.5F of the Migration Act. In particular:

- a) as to the nature of the persons' commitment to each other, the Tribunal considered that the timing, inception and duration of the relationship, and the circumstances surrounding the breakdown of Mr Mahmoud's previous relationship, cast doubt on the genuineness of Mr Mahmoud's commitment to the sponsor, as the evidence suggested that Mr Mahmoud's motivation for applying for the visa centred around his strong desire to remain in Australia after the expiry of his last substantive visa;²⁷
- b) the financial aspects of the relationship were considered²⁸ by reference to the large volume of documents that were provided by Mr Mahmoud to the Tribunal, which sought to demonstrate the pooling of Mr Mahmoud's financial resources with those of the sponsor. The financial aspects of the relationship were also traversed by reference to Mr Mahmoud's business.²⁹ The Tribunal made an adverse finding in relation to the financial aspects of the relationship. Specifically, the Tribunal found that Mr Mahmoud and the sponsor did not have adequate knowledge about the other person's financial arrangements;³⁰
- c) the Tribunal considered the nature of the household, including Mr Mahmoud's living arrangement with the sponsor, his relationship

²⁷CB 271 at [9] to [12]

²⁸CB 270 at [13] to [15]

²⁹CB 272 at [14]

³⁰CB 272 at [15]

with the sponsor's children, and whether they share responsibility for the care and support of children generally;³¹ and

- d) the Tribunal considered the social aspects of the relationship, and made a positive finding that the couple represent themselves to others as being married, that their friends and acquaintances hold the opinion that the relationship is genuine, and that the couple plan and undertake social activities together.³²

- 29. While sub-regulation 1.15A(2) requires that the Minister must consider all aspects of the relationship, including the specific matters set out in sub-regulation 1.15A(3), the Tribunal is not limited only to a consideration of those matters and may consider other matters that it considers to be relevant to a particular case.
- 30. In the present case, it is true that the Tribunal considered that the timing, inception and duration of the relationship cast doubt on the genuineness of Mr Mahmoud's commitment to the sponsor, which suggested that his motivation for applying for the visa centred around his strong desire to remain in Australia after the expiry of his last substantive visa.
- 31. However, the Minister submits that, read properly the Tribunal's reasons do not, as Mr Mahmoud seeks to argue, apply a "test of motivation" to the requirement in s.5F. Rather, the Tribunal considered the timing, inception and duration of the relationship³³ to be some of the relevant factors to consider in making an adverse finding about the nature of Mr Mahmoud's commitment to the sponsor under sub-regulation 1.15A(3)(d). The Tribunal expressed concerns about Mr Mahmoud's motivation in applying for the visa in the context of it making a finding at [25] that it was not satisfied that Mr Mahmoud was the spouse of the sponsor.
- 32. Further, the second particular in the first pleaded ground suggests that the Tribunal was required to make a "finding" about Mr Mahmoud's motivation, rather than just express concern about it. The legislative provisions oblige the Tribunal to make a finding about whether Mr Mahmoud was the spouse of the sponsor. To do this, it is required to

³¹CB 272 at [17] to [19]

³²CB 272 at [16]

³³at [9] to [11], and again at [24] of its reasons

consider (under s.5F(2)) whether the parties are validly married, whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether they are in a genuine and continuing relationship, and whether they live together.

33. The Minister submits that *Angkawijaya* has no particular application to the present case given that this was not a case where the Tribunal undertook an exercise to evaluate levels of love and emotion. However, as was observed by Allsop CJ in that decision at [2]:

The task of the delegate and the Tribunal was not straightforward. By reference to the terms of the Migration Act 1958 (Cth) and the regulations thereunder, a value judgment was required to be formed about whether two people had a mutual commitment to a shared life to the exclusion of all others that was genuine and continuing.

34. The Minister submits that, to seek to distil error from the use of the term “concern” when the Tribunal is setting out its value judgments on a variety of factors, is to read the Tribunal's reasons with an “eye too keenly attuned to the perception of error” in the manner rejected by the High Court in *Minister for Immigration v Wu Shan Liang*.³⁴
35. The Tribunal cumulatively evaluated the evidence in finding that while the parties were validly married and that they lived together, it was not satisfied that their relationship was genuine and continuing, nor that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others. On these two bases, the Tribunal found that the applicant was not the spouse of the sponsor. The Minister contends that the Tribunal did not err in its approach in this regard.

Resolution

36. The Tribunal’s decision is in some ways a curious one. The Tribunal acknowledged at [8] the substantial amount of documentary evidence that had been presented in support of the application and which addressed the various aspects of the relationship. The Tribunal had concerns about Mr Mahmoud’s motivation. In particular, at [11] the Tribunal stated:

³⁴(1996) 185 CLR 259

The applicant's evidence also implies that the applicant had a strong desire to live in Australia and that desire outweighed his family obligations at the time of the separation. Given the applicant's strong desire to live in Australia, the Tribunal is concerned that the present relationship was entered into solely to enable him to do so.

37. Notwithstanding that inference drawn by the Tribunal, it was unpersuaded at [10] that Mr Mahmoud's relationship with his former spouse broke down because of his wish to remain in Australia and her wish to return to Egypt. The Tribunal was also troubled at [12] that it took Mr Mahmoud two and a half years to divorce his first wife (which period, to my mind, and in knowledge of family law proceedings, is wholly unremarkable).
38. At [13] to [23], the Tribunal considered the evidence given by Mr Mahmoud and his sponsor about aspects of the relationship. Despite a reasonably extensive discussion of various inconsistencies in that evidence, the Tribunal concluded at [24] that the inconsistencies were minor and "of little significance". The Tribunal again acknowledged the "great amount" of documentary evidence concerning the various aspects of the relationship and the fact that the parties' oral evidence given to the Tribunal was "broadly consistent". It acknowledged that many aspects of the relationship point to the existence of a genuine and committed relationship. Nevertheless, the Tribunal was not satisfied that Mr Mahmoud and his sponsor had a genuine relationship. The Tribunal was not satisfied that Mr Mahmoud and the sponsor had a mutual commitment to a shared life to the exclusion of others. The Tribunal was not satisfied that their relationship was genuine and continuing. It appears from [24] that the essential reason for that lack of satisfaction was the Tribunal's "serious concerns about the circumstances of the break up of the applicant's previous relationship and the reasons for it" and its concern "about the applicant's motivations in entering this relationship because the Tribunal [was] concerned that his desire to remain in Australia was the primary, or the sole, consideration". In other words, the Tribunal was not satisfied that Mr Mahmoud met the visa criteria because of its concern that he had entered into the relationship with the sponsor purely or predominantly for the purpose of obtaining the visa.

39. I accept that a desire to remain in Australia is not necessarily inconsistent with the formation of a mutual commitment to a shared life with another person. I also accept that a visa applicant's motivation for entering a relationship is a relevant consideration for the Tribunal in considering a partner visa application.³⁵
40. Nevertheless, as Allsop CJ also found in *Angkawijaya* at [3] to [4], a decision maker may fall into error if a particular supposition about a relationship is elevated to a point which creates a false dichotomy. In *Angkawijaya*, that element was the concept of romantic love. In this case, in my opinion, a false dichotomy was created by the stress given by the Tribunal to Mr Mahmoud's motivation in entering his relationship with the sponsor. The elevation of the importance of Mr Mahmoud's undoubted desire to remain in Australia created, in my opinion, a false dichotomy between that desire and the legislative requirements. It is tolerably clear from [24] of the Tribunal's reasons that the decision in its mind turned upon the circumstances of the break up of Mr Mahmoud's previous relationship and Mr Mahmoud's motivation in entering his present relationship. In both circumstances, it appears that Mr Mahmoud's desire to remain in Australia was the essential reason for the ending of his first relationship and probably the dominant reason for entering into the new relationship with the sponsor. In my opinion, the reasoning of the Tribunal discloses that it created a false dichotomy between Mr Mahmoud's undoubted desire to remain in Australia and the existence of a genuine and continuing relationship with the sponsor. The creation of that false dichotomy, in my view, distracted the Tribunal from the essential visa criterion in s.5F of the Migration Act.
41. I find that jurisdictional error has been established in relation to Ground 1.

Ground 2 – did the Tribunal fail to comply with ss.359A or 359AA of the Migration Act?

42. I prefer the Minister's submissions in relation to this ground.
43. Ground 2 alleges a denial of procedural fairness. It is asserted that the Tribunal, at its hearing on 27 June 2016, took evidence from "a

³⁵ See *Angkawijaya* at [2], cited above at [33]

witness”, which included information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review, which has only been particularised by Mr Mahmoud’s written submissions.

44. The Tribunal did not send a letter pursuant to s.359A. The Minister submits that this is because the obligation to do so was not enlivened, the corollary of which was that the Tribunal was also not required to comply with the requirements of s.359AA.³⁶ I agree. The matters to which the applicant now seeks to allege he was denied procedural fairness did not engage with that section. That is because the Tribunal's findings were based on the inconsistencies raised by the applicant's evidence and the sponsor's evidence.
45. Inconsistencies and doubts do not give rise to obligations under s.359A of the Migration Act.³⁷ Moreover, none of the matters that underpinned any of the inconsistencies, nor the inconsistencies themselves, contained in their terms a rejection, denial or undermining of the questions that the Tribunal was to resolve.³⁸
46. As Rares J found in *SZSOG v Minister for Immigration*³⁹ at [29]:

It was open to the Tribunal to accept or not accept both accounts. It chose to evaluate the evidence of each spouse on the issue based on the fact that their accounts were not consistent. When it came to evaluate whether it would accept the evidence of each spouse, it considered whether there were inconsistencies or gaps between their various accounts for the purpose of deciding whether, and to what extent, it could accept the respective account. The lack of consistency between the accounts did not entail that, on the present facts, either account contained a rejection, denial or undermining of the other. The Tribunal could have found that the accounts either were sufficiently consistent or corroborative or, as it did, lacked consistency or corroboration of each other. But, that conclusion was an evaluation by the Tribunal of the effect of the evidence of two witnesses that, in itself, was neutral as to the veracity or reliability of the other spouse’s evidence. Neither spouse had said that the subject matter

³⁶see *SZNCW v Minister for Immigration* [2009] FCA 818 at [26] per Barker J with reference, as in *SZBYR* and *SZSOG* below, to the equivalent provision in Part 7 of the Migration Act

³⁷*SZBYR v Minister for Immigration* (2007) 96 ALD 1

³⁸see *SZBYR* (supra at [17])

³⁹[2014] FCA 1053

of the evidence of the other had not occurred so as to deny or reject or undermine the other's account.

47. The same can be said of the evidence and finding in the present case.
48. That the Tribunal proceeded to put to Mr Mahmoud (and the sponsor) various inconsistencies arising from their evidence⁴⁰ even where no such obligation existed, does not give rise to a jurisdictional error. As the Full Federal Court found in *SZGIY v Minister for Immigration*:⁴¹

The Tribunal may, out of an abundance of caution or concern for fairness, put a particular line of reasoning to an applicant in circumstances where s 424A has no application.

Conclusion

49. Mr Mahmoud has succeeded in establishing that the decision of the Tribunal is affected by jurisdictional error. He should receive relief in the form of the constitutional writs of certiorari and mandamus.
50. I will hear the parties as to costs.

I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Judge Driver

Date: 8 February 2018

⁴⁰CB 272 to 274 at [13], [14], [20], [22] and [23]

⁴¹[2008] FCAFC 68 at [30]